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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

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COURT OF CRIMINAL APPEALS
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JUAN ANTONIO GONZALEZ **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-14-00293-CR**

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

RAQUEL LOPEZ
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
201 EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 4503
FAX (915) 533-5520
EMAIL: raqlopez@epcounty.com
SBN 24092721

ATTORNEYS FOR THE STATE

IDENTITY OF PARTIES AND COUNSEL

APPELLANT: Juan Antonio Gonzalez, represented in the trial court by:

Ruben P. Morales	Ronald E. Henry	Alexandria Serra
Attorney at Law	Attorney at Law	Attorney at Law
718 Myrtle Avenue	1301 N. Oregon Street	5000 Quorum Drive
El Paso, Texas 79901	2nd Floor	Suite 215
	El Paso, Texas 79902	Dallas, Texas 75254

and on appeal and petition for discretionary review by:

Ruben P. Morales
Attorney at Law
718 Myrtle Avenue
El Paso, Texas 79901

APPELLEE: The State of Texas, 34th Judicial District Attorney's Office, represented in the trial court by:

Jaime Esparza, District Attorney
Denise E. Butterworth and James Bonneau, Assistant District Attorneys

and on appeal and discretionary review by:

Jaime Esparza, District Attorney
Raquel López, Assistant District Attorney
500 E. San Antonio, Suite 201
El Paso, Texas 79901

TRIAL COURT: 346th Judicial District Court of El Paso County, Texas, Honorable Angie Juarez Barill, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Steven L. Hughes (Hughes, J., not participating)

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Juan Antonio Gonzalez ("Gonzalez"), was indicted for capital murder on October 23, 2012. (CR:9).[1] After finding Gonzalez guilty of the lesser-included offense of murder, (CR:421, 423), the jury assessed punishment at 50 years' confinement, (CR:421, 447), and the trial court sentenced Gonzalez in accordance with the jury's verdicts. (CR2:762); (RR8:12). Gonzalez timely filed a motion for new trial on August 29, 2014, (CR:452), which was overruled by operation of law on October 13, 2014. Gonzalez timely filed notice of appeal. (CR:466).

On January 25, 2017, in an unpublished opinion, the Eighth Court of Appeals reversed Gonzalez' conviction and remanded the case to the trial court for a new trial. *See Gonzalez v. State*, No. 08-14-00293-CR, 2017 WL 360690, at *25 (Tex.App.–El Paso, Jan. 25, 2017, pet. granted)(not designated for publication). Specifically, the Eighth Court sustained Gonzalez' thirteenth and fourteenth issues presented for review and held that the admission of evidence of Gonzalez' possession and consumption of ecstasy pills on the day of the murder constituted

[1] Throughout this brief, references to the record will be made as follows: references to the clerk's record will be made as "CR" and page number, references to the reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

harmful error. *See id.* at *22. Having sustained Gonzalez' thirteenth and fourteenth issues, the Eighth Court did not address Gonzalez' remaining issues. *See id.* at *25. No motion for rehearing was filed.

The State timely filed its petition for discretionary review (PDR) on February 24, 2017. This Court granted the State's PDR on May 17, 2017, with the notation that oral argument will not be permitted.

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE: The Eighth Court erred in holding that evidence that Gonzalez had consumed ecstasy on the day of the murder was irrelevant to his state of mind and self-defense claim because the State failed to introduce evidence of the drug's half-life or the length of its effects, and that, despite any bearing it had on the central issue of self-defense or the relatively innocuous nature of the intoxication evidence, when compared to the severity of the charged offense (capital murder), its probative value was substantially outweighed by the danger of unfair prejudice.

GROUND FOR REVIEW TWO: The Eighth Court erred in holding that any erroneous admission of Gonzalez' possession and consumption of ecstasy the day of the murder constituted harmful error where the complained-of evidence was developed quickly through a single witness, the State did not allude to the evidence during closing arguments, and Gonzalez' defensive evidence was internally inconsistent and controverted by the State's evidence. In disregarding the weight of these factors, the Eighth Court erred in its application of the appropriate harm standard.

STATEMENT OF FACTS

This case arises out of 17-year-old Gonzalez' brutal attack on Jonathan Molina ("Molina"), an officer of the El Paso Police Department ("EPPD"), during which Molina suffered a fatal head injury that resulted in his death. At trial, there was no dispute that Molina and Gonzalez engaged in a physical altercation, or that Molina's death was a result of the injuries sustained during that altercation. Rather, the primary disputes were whether Gonzalez or Molina was the first aggressor and whether Gonzalez deployed deadly force against Molina in self-defense. A summary of the evidence on those issues follows.

The Passersby

On September 25, 2012, sometime around 5:00 p.m., Mario Ramos ("Ramos"), who was driving home from work on Trowbridge Drive, saw two males (later identified as Gonzalez and Molina) standing on the sidewalk in front of a driveway, engaged in what appeared to be an argument. (RR3:42-46, 49, 54, 63-65, 68-69, 77, 79, 95); (RR5:8, 18-19); (SX2); (SX3A); (SX30). Ramos observed two more teenagers[2] standing nearby, and one of them seemed to be trying to get Gonzalez to keep walking, waving his arm as if to say "let's go."

[2] These other two teenagers were Gonzalez' friends, Alan Medrano ("Medrano") and Juan Antonio Gomez ("Gomez"), to whom Gonzalez and Medrano referred as "Tony." (RR3:205-06, 302); (RR5:117-18, 127).

(RR3:117-118).

Although Ramos could not hear what Gonzalez and Molina were saying, it looked like Gonzalez was yelling at Molina. (RR3:52, 115). Ramos pulled over about two to three houses down (across the street from where the argument was taking place) and continued to watch the two males for the next two-to-three minutes in case someone needed help. (RR3:46, 51, 54-55, 83).

Meanwhile, Laura Mena ("Mena"), traveling along the same street, also noticed the group of men standing on the driveway in an apparent confrontation. (RR3:121, 129-31). Mena anticipated that there would be a fight, as the three teenagers (Gonzalez, Medrano, and Gomez) were standing very close to Molina. (RR3:131-32, 147). It looked like Gonzalez was confronting Molina, who was standing by himself. (RR3:131-32).[3] Before arriving at the next block, Mena made a u-turn and drove back to where the group of men stood. (RR3:131).

Ramos, who by this time had pulled over to the side of the street and was observing the confrontation through his side-view mirror, saw Gonzalez, who was taller than Molina, take a couple of steps toward Molina, causing him to take a few steps back. (RR3:49-51, 79). Gonzalez then punched Molina, the two fell to the

[3] During cross examination, in response to defense counsel's attempt to characterize the confrontation as one in which Molina was confronting the teenagers, Mena reiterated that "[i]t looked more like the boys were confronting [Molina]." (RR3:154).

ground,[4] and, about ten seconds later, Gonzalez got up and walked away with Medrano and Gomez. (RR3:52, 77, 96).

By this time, Erin Lile ("Lile") had observed the altercation from the opposite direction on the same street. (RR3:157-60, 188). As she approached the scene of the apparent confrontation, she, like Mena, saw Gonzalez, Medrano, and Gomez standing close together on one side, while Molina stood by himself on the opposite side. (RR3:160, 164-65); (SX2).[5] After slowing down "to a crawl," Lile drove by and saw Gonzalez and Molina, who were standing within two feet of each other, "raise their arms" and then "split apart," increasing the space between them. (RR3:160, 165-66, 187, 199). Gonzalez then ran towards Molina and "bum rushed" him, knocking him off his feet and causing him to "fly" backwards with his legs up in the air before hitting the ground. (RR3:160-61, 168-69, 171, 203).[6]

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[4] Ramos testified that his vantage point was behind Gonzalez, where he could see Gonzalez' back and the right side of Molina's body. (RR3:90-91). Ramos explained that he was unable to see how the two landed when they fell to the ground and lost sight of them shortly before seeing Gonzalez get up. (RR3:88, 92, 96).

[5] Lile's vantage point was behind Molina, opposite that of Ramos. Gonzalez was facing Lile, while Molina had his back turned toward Lile. (RR3:186).

[6] Lile, in describing the manner in which Gonzalez rushed Molina, stated, "I mean, knocked him off his feet to where, again, from my view, it looked like he flew backwards. I mean, feet off the ground, down to the ground." Molina's body "went horizontal" before hitting the ground, at which point his head also hit the ground. (RR3:169).

And during cross examination, when defense counsel characterized Gonzalez' actions as a "shove," Lile stated that it was "more than a shove," that Gonzalez "completely. . . rammed [Molina]," and that "the kid [whose] back was to [her] ran into the man" that was facing her

Gonzalez then climbed on top of Molina and started "pummeling him" in the face with both fists. (RR3:161, 166-70, 203). Gonzalez got up and walked away with his friends, leaving Molina lying on the ground. (RR3:172-73).

After witnessing the altercation, Ramos, Lile, and Mena each made a u-turn and drove back to where Molina lay on the ground. (RR3:56-57, 59, 110-11, 172, 202).[7] By the time they got to where Molina lay, Gonzalez, Medrano, and Gomez had already walked away. (RR3:52, 134, 172-73). An older woman, who had been standing on the porch of the house where the assault took place, pointed at Molina, signaling to one of the women (either Lile or Mena) that Molina needed help. (RR3:57-58, 140, 153).

Mena got out of her car and yelled at Gonzalez, Medrano, and Gomez to "get back here," but Gonzalez simply threw his arm up and ignored her, and the three of them continued to walk away. (RR3:134-37, 141, 151). Mena approached Molina, who was still on the ground, and saw that he appeared to be having a seizure, that he had a bloody nose and two large bumps on his head, and

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(Lile). (RR3:195). And when defense counsel questioned Lile as to the point at which she saw "the kid push the other one," Lile, again, iterated, "Not push, run into." (RR3:197).

[7] While Mena witnessed the confrontation leading to the assault, she did not witness the actual physical altercation. (RR3:138, 147, 150). And because Ramos lost sight of Gonzalez and Molina after they fell to the ground, he did not see Gonzalez punch Molina while on the ground. (RR3:75-76); *supra*, note 5. Neither Ramos, Lile, nor Mena had ever met Gonzalez, Molina, Medrano, or Gomez. (RR3:72, 134, 163).

that he had an injury to the back of his head that looked "bad." (RR3:134,137-38). Mena immediately called 911, while Ramos (who also called 911) followed Gonzalez, Medrano, and Gomez and saw that they ran south on an intersecting access road before losing sight of them. (RR3:61-62, 100, 134); (SX1-2). Ramos told the 911 operator that Molina was shaking and appeared to be having a seizure. (RR2:59-60, 99).

Lile, too, went to Molina's aid and attempted to keep him from trying to get up, but Molina did not appear to comprehend what she was saying. (RR3:173-74, 202). With his face "blown up" from the injuries, his forehead covered in "knots," and blood running from his nose, Molina was unable to get up. (RR3:173-76, 203-04); (SX46).[8] Like Ramos, Lile also saw Gonzalez, Medrano, and Gomez turn the corner onto the intersecting access road before losing sight of them. (RR3:172-73).

Molina's Injuries

When paramedics arrived, Molina was exhibiting signs of a brain injury and an accompanying, deteriorating mental state—he had bruising around both eyes (a

[8] It was not until Lile tended to Molina that she noticed a gun tucked inside the waistband of his pants. (RR3:176-77). Ramos heard Lile say that Molina had a gun. (RR3:152). None of the witnesses (including Gonzalez and Medrano) claimed to have been aware that Molina carried a gun.

consequence of large amounts of blood pooling around the eyes), was unable to respond to any of the paramedics' routine questions, became combative, and began projectile vomiting. (RR4A:174-79). By the time he arrived at the hospital, Molina was entirely unresponsive, unable to so much as roll his eyes. (RR4A:179-80). Molina died from his injuries ten days later. (RR4B:39-41).

Paramedic Victor Oshiro likened Molina's head injuries to those normally sustained by a motorcyclist when his head hits the pavement after being separated from his motorcycle at a high rate of speed, or by a person falling 12 feet, head-first into a swimming pool. (RR4A:184).

El Paso Chief Medical Examiner Dr. Contin testified that Molina, as a result of his injuries, underwent surgical removal of a portion of his skull in an effort to relieve pressure in his brain caused by severe swelling. (RR4B:39-40). Molina had abrasions on his left hand and right elbow, abrasions and a contusion to the back of his head, and a fracture at the top of his skull, which started from the point of impact at the back of the head and continued all the way to the left frontal area of the skull. (RR4B:39, 41, 57, 60); (SX32-33, 40). Dr. Contin testified that while such a fracture theoretically could be caused by a person of sufficient weight

falling in just the right way,[9] it could also be caused by an uninterrupted fall, such as one where a person's legs were swept up from under him and the person landed on the back of his head. (RR4B:42, 71). However, he also stated that if the person somehow was able to brace his fall, he would not expect to see the kind of injury that Molina sustained. (RR4B:42-43).

Molina's injuries were so severe, and his brain rendered so soft by the impact from his fall, that his brain collapsed when Dr. Contin opened his skull. (RR4B:58, 61); (SX33, 37). Dr. Contin explained that Molina suffered contracoup contusions to the front of his brain, a type of contusion caused by a point of impact on one side of the head, which, in turn, causes the brain to be lunged into the opposite side of the skull. (RR4B:62). Molina also suffered subarachnoid hemorrhaging (bleeding of the surface of the brain) through the brain's protective membrane. (RR4B:43).

Dr. Contin further explained that a person who sustained an injury as severe as the one that Molina sustained would have most likely been unconscious at the time of the impact, specifically agreeing that such a person would have been unconscious if he hit the back of his head on the sidewalk after an uninterrupted

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[9] Dr. Contin testified that Molina weighed 275 pounds, but was not asked and did not render an opinion as to whether his weight would have been sufficient to cause his injuries if he fell by himself in just the right way. (RR4B:70).

fall caused by someone sweeping his legs out from under him. (RR4B:43, 63-65). Dr. Contin also opined that verbal unresponsiveness, incoherence, combativeness, projectile vomiting, and loss of consciousness were all consistent with the type of head and brain injuries sustained by Molina. (RR4B:65).

Dr. Contin concluded that Molina was "brain dead" from day one. (RR4B:67).[10] In Dr. Contin's opinion, it was improbable that anyone who sustained injuries such as those inflicted on Molina could have survived. (RR4B:43-44).

Gonzalez' In-Court Testimony

At trial, Gonzalez testified that the altercation between him and Molina was "just a fight,"[11] that he never meant to kill Molina, and that he only attacked Molina because he thought Molina, who had been acting "like a street jerk," would hurt him (Gonzalez). (RR5:141, 143, 146-47, 151).

Gonzalez testified that on the day of the murder, he had attended a full day of school at Sunset High School. (RR5:116). After school, he and his two friends,

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[10] Dr. Contin explained that punching someone in the head would cause damage, although, in this case, blunt-force trauma to the head, not punches, caused Molina's death. (RR4B:76, 78).

[11] Gonzalez testified that killing Molina never crossed his mind and characterized the fight as a common one, testifying that he thought it was akin to other school fights he had witnessed, where both individuals are fine, though they may go to the nurse's office afterwards or get in trouble with the principal. (RR5:146, 149).

Medrano and Gomez,[12] walked to a mechanic's shop in central El Paso to check on Medrano's car. (RR5:116, 117-18, 120). They had decided that if Medrano's car was ready, they would all return to their after-school, credit-recovery class in Medrano's car, but if it was not ready, then they would just continue to walk to each of their respective homes located nearby. (RR5:116, 120). The three of them made their way as planned, talking and playing games and listening to music on their phones and iPods. (RR5:120-21). They walked through Memorial Park, crossed the railroad tracks, and then stopped at the mechanic's shop. (RR5:120). Since Medrano's car was not ready, they kept walking home, ending up on Trowbridge. (RR5:121-22).

At some point after turning onto Trowbridge, Molina came out of his house, stood at his front porch (about two houses behind Gonzalez and his friends), and yelled, "You fucking faggots." (RR5:124-25). Gonzalez turned back to look at Molina, but then turned back around without saying anything and continued walking home with his friends. (RR5:124-25). Gonzalez testified that he and his friends continued to walk at a "regular speed," neither speeding up nor slowing down. (RR5:126).

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[12] Gomez invoked his Fifth Amendment rights outside the presence of the jury and did not testify. (RR4A:72, 76, 162-64).

After crossing the street at the next block, Gonzalez heard a car pull up to his side. (RR126). There was nothing remarkable about how the car pulled up, and Gonzalez "remembe[red] thinking it was just somebody riding home." (RR5:126). Gonzalez heard the door open, turned around and saw that it was Molina who had pulled up in the car, and then simply turned back around and kept walking. (RR5:127). Molina appeared "very angry" and yelled at Gomez, "Hey, you fucking faggot," before approaching him and asking, "Why the fuck did you scratch my car?" (RR5:127). Gomez denied it, and the two, standing about "two arms' length" apart, started arguing and cussing at each other. (RR5:127-29, 132). Molina told Gomez, "[F]uck you. Get out of here[,] you bitch," but Gomez continued to deny scratching Molina's car, and the argument continued. (RR5:129). Gomez and Molina got closer to each other, to about an arm's length apart. (RR5:130). And even though neither of them got any closer to the other or made any physical contact, Gonzalez felt that the argument got "heated," "elevated," grew louder, and "more hands were being used, more motions." (RR5:129, 133). Gonzalez took a step forward, pulled Gomez back, and, using his "normal inside voice," told him and Molina to "calm down." (RR5:134, 137).

Molina then started cussing at Gonzalez, "Who are you to tell me what to do?" and "What are you doing here?" (RR5:135). Gonzalez, who denied having

seen Gomez scratch any cars, (RR5:202-23), claimed to have told Molina that Gomez had not done anything and to "[l]et [them] continue to go home" and that, because Molina was being aggressive and making threats, he (Gonzalez) was now scared for himself and his friends, as, despite Molina being a few inches shorter than him, he (Molina) was wider and bigger than him and much bigger than Gomez. (RR5:135-36).

Gonzalez testified that it "looked like a big guy that was going to hurt this little kid," and that when he intervened, Molina told him, "Fuck you. You bitch. Get the hell out of here." (RR5:137). But Gonzalez did not feel he could leave because Molina had followed them once before, and he thought Molina would follow them again and hurt them. (RR5:137-38). Still, Gonzalez hoped he could diffuse the situation, but Molina "wouldn't listen" and "kept arguing," which upset Gonzalez, so he started cussing at Molina, too. (RR5:138). Molina and Gonzalez, who had started arguing at arm's length, now stood nose-to-nose when Molina told Gonzalez that he (Molina) was a cop. (RR5:139-40). Gonzalez demanded to see his badge, but Molina replied that he "didn't have to show him shit," asking an older lady sitting on her porch to call the police instead. (RR5:140).[13] Gonzalez

[13] Gonzalez testified that Molina was acting "like a street jerk," so he did not believe that Molina was really an officer. (RR5:141).

testified that he told Molina, "I'm 17. You can't hit me," to which Molina replied that he could "kick their ass," and Gonzalez believed him. (RR5:138, 145).

Molina, yet again, told Gonzalez to get out of there, telling him that he (Gonzalez) had nothing to do there and that it was none of his business, saying, "Just leave." (RR5:139). Molina pushed Gonzalez in the shoulder "real quick," causing him (Gonzalez) to stumble back. (RR5:143). In turn, Gonzalez punched Molina twice because he "was scared." (RR5:143). After punching him twice, Gonzalez "grabbed" Molina and "pushed him over to the floor" because he (Gonzalez) did not know if Molina was really going to hurt him. (RR5:143, 145, 146).[14]

Gonzalez fell on top of Molina, who was now using his legs to try to kick Gonzalez off of him. (RR5:144). So, Gonzalez punched Molina two more times until Molina either stopped fighting back or Gonzalez got up. (RR5:144). Medrano told Gonzalez, "Come on, let's go," and Gonzalez turned around and walked away with Medrano and Gomez. (RR5:144, 146-47). Gonzalez testified

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[14] [Defense Counsel]: After you hit him, what did you do?
[Gonzalez]: After I hit him, I mean, . . . the expression on his face was–I mean, I didn't know if he was really going to hurt me, so I got scared, and I went to grab him, and I pushed him over to the floor.

(RR5:143).

that when he (Gonzalez) walked away, Molina looked like he was trying to get up and "shake himself off and just get up." (RR5:147). When they reached the end of the street, Gonzalez heard someone say they were calling the cops, so he got scared and ran home. (RR5:147-48).

Gonzalez testified that, after leaving Molina on the ground, he remembered talking with his friends about planning a birthday party for Medrano, but did not remember talking about what had just occurred. (RR5:151, 159). When he arrived home, there were police cars everywhere, and after hearing in the news that a man had been killed in central El Paso, he broke down and started crying. (RR5:150). He sent three messages to Medrano on Facebook, the first of which was sent at 5:49 p.m., and stated, "I hope you didn't get caught. I killed the guy. He went into compulsions [sic] and died." (RR5:152-53, 190); (SX10A). Gonzalez explained that, at that point, he truly believed that he had killed Molina because the news falsely reported that Molina had died. (RR5:154). The second Facebook message, sent at 6:25 p.m., stated, "Haha jk *Weii* I seen that shit on the news." (RR5:154); (SX10A). Gonzalez claimed that before he sent the second message, the news had corrected its story and reported that the man was still alive. (RR5:154). The third message, sent at 6:49 p.m., stated, "Dude turn on the news dude there's all this crap going on." (RR5:153); (SX10A). Gonzalez was arrested

the following morning. (RR5:156).

During cross examination, however, the State elicited from Gonzalez that, before sending any messages to Medrano the night he attacked Molina, he first sent several Facebook messages to his then-girlfriend, Desiree Denise ("Desiree"). (RR5:191); (SX10B). In one of those messages, contrary to his previous testimony that Molina looked like he was "trying to get up" and "gather himself" when Gonzalez left, Gonzalez stated that Molina started bleeding and twitching. (RR5:169, 188, 191-92); (SX10B). Gonzalez acknowledged that the version of events contained in his Facebook messages was completely different, and yet insisted that he was telling the truth at trial, claiming that the events of the "horrific accident" were "lodged in [his] memory." (RR5:159, 192-93).

Also in that same message, Gonzalez told Desiree that he had punched and tackled Molina because he (Molina) had been "talking shit" to him and his two friends while walking home, not because he was scared or felt threatened. (RR5:191); (SX10B).[15] He did, however, write, "I'm sooo sorry babe, I shouldn't have hit him, I don't know what I was thinking . . . ." (SX10B).

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[15] The State introduced into evidence eight Facebook messages sent to Desiree and three messages sent to Medrano that night. (SX10A-B). In none of those messages did Gonzalez claim to have been scared of Molina (either for himself or for either of his friends) and merely stated (doing so only in response to Desiree's message that she hoped Gonzalez was not in trouble), "It's not my fault tho he was like 30 and twice my size, me either babe I'm really really really scared :/". (SX10B).

Also during cross examination, Gonzalez initially denied evading police after the incident, first stating that police did not show up until he was already at his apartment complex, but then admitting that he ran from the police. (RR5:168). He admitted that, in response to Molina telling him to leave, Gonzalez refused by saying, "This is public property. I don't have to leave. If you don't like it, you can leave, sir." (RR5:160). However, he denied throwing his arm up and dismissing Mena's plea to return to the injured Molina. (RR5:200-01). Finally, Gonzalez agreed that, even though the older lady who witnessed the argument was only 10-15 feet away, he never asked her for help. (RR5:162, 164).

Medrano's In-Court Testimony

Medrano testified that, at the time of the murder, he had been friends with Gonzalez for about four years. (RR3:206-09). Medrano would wrestle with Gonzalez at a friend's house two-to-three times per week, where they would teach each other different boxing and judo maneuvers. (RR3:209, 231, 233). Medrano, who had trained in boxing for five or six months at a gym, would teach Gonzalez how to hook, jab, and punch, while Gonzalez, who had studied judo for two-to-three months, years earlier, would teach Medrano how to "take someone down" from their legs. (RR3:211, 230-32, 280). This judo move that Gonzalez taught Medrano was meant to enable him to take down someone bigger than him, to "use

a person's force against them" by grabbing the person by the legs and picking him up. (RR3:232, 253). "Once they fall, you can have them on the ground," Medrano explained. (RR3:232).

Medrano similarly testified that, after school let out at 3:45 p.m., he, Gonzalez, and Gomez walked home along Trowbridge. (RR3:209, 234-35). Medrano was listening to music on his phone and ended up walking a few steps ahead of Gomez and Gonzalez at some point. (RR3:234-35, 288).

Eventually, he heard Gomez laughing, so he turned around and saw that Gomez, who was standing next to Gonzalez, had a metal tube in his hand. (RR3:235-36). Medrano saw Gomez scratch at least one car, including Molina's car. (RR3:237). They continued walking, and as they reached the end of the block, Medrano heard Molina yelling from his house for them to come back. (RR3:238-39); (RR4A:8). Molina was looking at his car, which was the same car that Medrano saw Gomez scratch. (RR3:239); (SX25-28). The three of them ignored Molina and kept walking. (RR3:238-39).

After crossing the street at the next block, Medrano saw that Molina had pulled up next to them in the same car that Gomez had scratched. (RR3:239); (RR4A:11). Molina got out of the car and asked Gomez why he scratched his (Molina's) car, but Gomez denied it even though Molina told him he saw him do it

through his window, so the two started arguing—Molina telling Gomez that it was not okay to scratch his property, and Gomez continuing to deny it. (RR3:239-41). Molina became aggressive due to Gomez's continual denials and started calling Gomez a "little kid" and a "fag." (RR3:241).

Less than a minute into Gomez's and Molina's argument, Gonzalez stepped in and told Molina to "chill the fuck out." (RR3:296); (RR4A:24, 28). The two argued and, eventually, Molina told the three friends to "Get the fuck out of there." (RR3:241).

Molina told them that he was an officer, and when they demanded to see his badge, Molina responded, "I don't have to show you shit." (RR3:243, 298). Molina and Gonzalez continued to argue, getting within three inches of each other's nose before Molina pushed Gonzalez with his shoulder. (RR3:245-46). Gonzalez automatically responded by punching Molina. (RR3:250); (RR4A:33, 36). Molina reacted by putting his hands up, as if ready to fight, but Gonzalez punched him again before he (Molina) "could do something bad," grabbed him by the legs, and took him down to the ground. (RR3:252); (RR4A:33, 35-36).

Unlike Gonzalez, Medrano testified that once Molina was down on the sidewalk, Gonzalez quickly got on top of him, straddled him, and punched him again. (RR3:254-55); (RR4A:40-41, 51). Molina put his fists up to try to defend

himself from Gonzalez, but Gonzalez punched him once more. (RR3:255); (RR4A:35, 41).

Once Molina stopped responding, Gonzalez stopped hitting him and got up, and Medrano told him that they needed to leave. (RR3:256); (RR4A:41-42, 49). Medrano stated that he was not sure if Molina had been knocked out cold, but agreed that Gonzalez "got the better of the fight." (RR3:256); (RR4A:58). As they started walking away (leaving Molina lying on the ground), Gonzalez was "really, really mad," complaining that he did not know why Molina yelled at him for no reason, that Molina had "really pissed [him] off," and that Molina was not his father and was no one to be yelling at him like that. (RR3:259-60, 262); (RR4:101). And as they walked away, a woman yelled at them to go back, but they ignored her, kept walking, and then started running. (RR3:256, 259). Soon after, police gave chase on foot, and Medrano was apprehended. (RR3:264).

During cross examination by defense counsel, in support of Gonzalez' self-defense theory, and contrary, in part, to his earlier testimony, Medrano testified that: (1) he did not know if Gomez had scratched any cars, (RR4A:15); (2) Gonzalez kept walking when Molina came out of his house and yelled at the three of them because Gonzalez must not have wanted a confrontation, (RR4A:9); (3) he (Medrano) believed Molina could have hurt Gonzalez, and that Gonzalez, who did

not appear to want to fight, had acted in self-defense and, perhaps, in defense of Gomez, (RR4A:55-56, 58, 62); (4) Molina seemed to want a confrontation from the beginning, though he (Medrano) was not afraid at first, (RR4A:9, 10); (5) he (Medrano) started to get scared once Molina got out of his car and walked towards Gomez, who was smaller than Medrano, because he felt like "something was going to happen," (RR4A:12-13); (6) Molina got close to Gomez and started cussing at him, calling him a "fag," (though he did not agree, as defense counsel suggested, that Molina got in Gomez's face), (RR3:286); (RR4A:21-22); (7) Molina and Gonzalez moved closer to each other as the argument progressed, and Molina was being aggressive and would not back down, (RR4A:24-25); and (8) he (Medrano) did not think he could leave because Molina might follow them in the car. (RR4A:27). And, agreeing with defense counsel's characterization of how Molina ended up on the ground, Medrano indicated that Molina merely "fell" as Gonzalez was "pushing in the direction that [Molina] [was] falling." (RR4A:44).[16]

During direct examination (and again during re-direct examination) by the State, Medrano acknowledged a slew of inconsistencies in his testimony. Medrano admitted that, while he testified that Gonzalez punched Molina twice

[16] Medrano did not remember Molina telling them that he could "kick their ass," but did recall Molina asking someone to call the police at one point. (RR4A:30, 57).

while standing and only twice while down on the ground, he told police that Gonzalez punched Molina once while standing and three times (not twice) after taking him down. (RR3:255). He also changed his account as to how Molina pushed Gonzalez, first saying that it was with his hands and then stating that it was with his shoulder. (RR3:245). Additionally, he never told police that Molina used the word "fag," or that before Gonzalez took him down onto the sidewalk, Molina had put his fists up, as if ready to fight. (RR3:91-92, 286); (RR4A:272). Instead, Medrano told police that Gonzalez punched Molina and then immediately grabbed him by the knees and took him down to the ground. (RR4A:93). Medrano specifically agreed that his memory was fresher at the time that he spoke to the police. (RR4A:65).

While he had, at an earlier point in his testimony, claimed that he did not know if Gomez had scratched any cars, he agreed that he had told police, "I saw when [Gomez] did it . . . [Gomez] scratched the police car, yes, the officer's car." (RR4A:103-04). And though he had testified that Gonzalez stopped hitting Molina when he (Molina) stopped responding, he later testified that Gonzalez was going to hit Molina again but did not do so because Medrano had told him, "enough," and both he and Gomez told him, "Let's go." (RR3:257-58);

(RR4A:106-07).[17] He also agreed that even though he insisted that he did not feel he could leave during the altercation, Molina actually kept telling them to leave, but they refused. (RR4A:64-65, 98). And while he testified at trial that he did not know if Molina had been knocked out, what he told police was that Molina "looked stiff, just stiff," that he was "just laying [sic] there," and that "his eyes were closed." (RR3:257).

Medrano insisted that he had told police that Molina refused to show his badge by stating that he did not have to "show them shit," but when confronted with his police-interview transcript, he was unable to refer the prosecutor to the statement, ultimately agreeing that what he actually told police was, "The only thing I remember is, 'Like—he is, like, I'm police.' And we all asked him, 'Where is your badge?' And except [sic] of his showing his badge, he turned around to the lady, the witness that saw everything. He just went and said, 'Call the cops. Call the police.'" (RR4A:65-66, 80-81).[18]

Medrano agreed that he had testified that Molina was aggressive with Gomez right out of the gate, but that he told police something different—that

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[17] Earlier on direct examination, Medrano agreed that he told police that Gonzalez was going to hit Molina again but stopped because Gomez intervened and told him they had to leave. (RR3:258).

[18] The witness who was standing on her porch during the altercation was deceased at the time of trial. (RR4B:21); (SX29).

when Molina came out of his house, he yelled out, "Hey, Bro," and that Gomez ignored him and kept walking; that Molina was not mad, because Medrano could tell from someone's expression if they were mad, and that Molina was just upset, "like 'What's going on? What happened to my car?'" (RR4A:82, 84-85). And contrary to his earlier assertion that Gonzalez automatically responded with a punch after Molina shoved him, what Medrano told police was that Gonzalez "waited until [Molina] turned to Tony. [Molina] starts yelling at Tony, and that is when [Gonzalez] hit him, because he got mad." (RR3:247-50); (RR4A:88, 90, 97-98). Medrano further stated that he saw Molina turn his attention toward Tony and away from Gonzalez. (RR4A:94). Finally, rather than simply "tripping" and "taking [Molina] down with him" (as he had testified at trial), Medrano told police that Gonzalez picked up Molina from the legs and dropped him. (RR3:250-51, 253).[19]

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[19] [Prosecutor]: Is that one of the things that he showed you that he knew from judo?
[Medrano]: Yes, ma'am.
[Prosecutor]: How to take down, correct?
[Medrano]: Yes, ma'am.
[Prosecutor]: How to take down people that are bigger than him, correct?
[Medrano]: Yes, ma'am.

(RR3:253).

* * *

[Prosecutor]: And then he fell on the back–the back of his head, correct?
[Medrano]: Yes, ma'am.
[Prosecutor]: That's how you take down someone bigger than you?
[Medrano]: Yes, ma'am.

Gonzalez' Possession and Consumption of Ecstasy

After Gonzalez proffered to the jury his version of the events—that he had been at school all day, that he and his friends had decided to walk home after finding out that Medrano's car was not ready at the mechanic's shop, that Molina was the first aggressor, and that he (Gonzalez) acted in self-defense without intending to kill Molina—the State sought to rebut his self-defense theory with evidence of a Facebook conversation between him and Desiree earlier that day:

[Gonzalez]: "Cuz I'm Rollin at school (/.\)" (sent at 10:32 a.m.)

[Desiree]: "With our pills?" (sent at 10:33 a.m.)

[Gonzalez]: "No with my extra one I still have our pills babe c:" (sent at 10:34 a.m.)

* * *

[Gonzalez]: "I'm shaking >.<" (sent at 10:44 a.m.)

[Gonzalez]: "It's starting to hit me (/.\)" (sent at 10:45 a.m.)

[Desiree]: "Lucky :c" (sent at 10:45 a.m.)

[Gonzalez]: "No I don't wanna roll in class :(I trip bad at school, And don't worry babe I'm saving two for us c:" (sent at 10:47 a.m.)

[Gonzalez]: "Oh god babe (/.\) stay with me babe, I'm starting to trip bad :c"

[Prosecutor]: So you can get on top of him, correct?
[Medrano]: Yes, ma'am.

(RR3:254).

(sent at 10:50 a.m.)

[Desiree]: "Calm down babe :b your fine >,<" (sent at 10:51 a.m.)

[Gonzalez]: "I know, I know, just don't like tripping at school :p . . ." (sent at 10:53 a.m.)

* * *

[Gonzalez]: I only freak out at school other then that I'm fine :p" (sent at 10:58 a.m.")

(RR5:171).[20]

Relevant to this appeal, Gonzalez objected to the introduction of the Facebook conversation on grounds of relevance and unfair prejudice. (RR5:172). The State explained that because Gonzalez had testified he had been at school all day before walking down Trowbridge with his friends where the murder occurred, Gonzalez' state of mind was relevant, that his own statements that he was high at school were probative of that issue, and that the State would simply ask Gonzalez whether he was still under the influence of the ecstasy pills at the time of the altercation. (RR5:173, 185).

The trial court overruled all of Gonzalez' objections, reasoning that, because the Facebook messages regarded the day of the murder (and only that day), they were relevant and more probative than prejudicial. (RR5:186-88). The

[20] The trial court took judicial notice of the fact that the "UTC" time zone contained in the Facebook records is six hours ahead of El Paso time. (RR5:153); (SX10B). The times set out above account for this time difference.

State continued its cross examination of Gonzalez.

After Gonzalez reiterated that he had been at school all day and that the incident occurred after-school while he was walking home, the prosecutor reviewed with Gonzalez each of the above-mentioned Facebook messages, which he confirmed were sent by him to Desiree while he was still at school the day of the murder. (RR5:196-99).[21] The prosecutor then asked about the effect of his earlier drug use on his state of mind at the time of the altercation:

[Prosecutor]:	. . . So you are taking what kind of pill while at school that's making you shake, trip out, and not feel good?
[Gonzalez]:	Yes, ma'am.
[Prosecutor]:	What is it?
[Gonzalez]:	An ecstasy pill.
[Prosecutor]:	Are you still under the influence of that as you are walking home and this confrontation occurred with the officer?
[Gonzalez]:	No, ma'am.
[Prosecutor]:	You are not?
[Gonzalez]:	No, ma'am.

[21] During this cursory review of the messages, Gonzalez also explained the types of facial expressions conveyed by each of the "emojis" contained in the Facebook conversation. *See* (RR5:197-200).

[Prosecutor]: Did you take anymore [sic] before that?

[Gonzalez]: No, ma'am.

[Prosecutor]: We have to believe you, right, Mr. Gonzalez?

(RR5:199-200). The trial court sustained defense counsel's "argumentative" objection to the last question and ordered the jury to disregard it. (RR5:200). The prosecutor thereafter abandoned the subject of the ecstasy pills and did not revisit it during the rest of the guilt-innocence phase of trial.

The jury found Gonzalez guilty of the lesser-included offense of murder and assessed punishment at 50 years' confinement. (RR6:128); (RR8:5); (CR421, 423, 447).

SUMMARY OF THE STATE'S ARGUMENTS

GROUND FOR REVIEW ONE:

It is well settled that evidence is relevant even if it only provides a "small nudge" in proving or disproving a fact of consequence to the trial. But, instead, in requiring the State to present evidence of ecstasy's half-life, as well as the length and type of its effects, before the State would be permitted to rebut Gonzalez' self-defense claim by presenting the jury with evidence of Gonzalez' ecstasy intoxication the day of the murder, the Eighth Court required the State to definitively *establish* a fact of consequence before presenting any evidence *tending* to establish that fact. In doing so, the Eighth Court confused sufficiency of the evidence with admissibility of the evidence, and in effect, impermissibly heightened the low-threshold burden for relevance.

Furthermore, in concluding that the probative value of the ecstasy evidence was substantially outweighed by the danger of unfair prejudice, the Eighth Court failed to account for the minimal time spent by the State in developing the evidence, the lack of emphasis by the State, the probative value to Gonzalez' self-defense claim (the central dispute in the capital-murder trial), and the State's corresponding need for the evidence—all factors weighing in favor of the State. Thus, the Eighth Court erred in holding that admission of the ecstasy evidence was

unfairly prejudicial.

GROUND FOR REVIEW TWO:

By holding that the admission of the complained-of ecstasy evidence was harmful error because it cast Gonzalez "in a very poor light," the Eighth Court did not apply the appropriate harm standard and thus erred.

Under the proper harm analysis, the admission of the complained-of ecstasy evidence was harmless because: (1) the nature of the drug-use evidence admitted consisted of nothing more than Gonzalez' ingestion of a single ecstasy pill and his possession of two more pills he was saving for later use with this girlfriend, which in comparison to the seriousness of the crime with which he was charged (capital murder), was rather innocuous, and thus, unlikely in itself to sway the jury from a state of non-persuasion to one of persuasion on the issue of guilt; (2) the State only briefly delved into the issue via a single witness, did not revisit the subject during the rest of the guilt-innocence phase, and made no mention of the issue during its closing argument; and (3) Gonzalez' defensive evidence was internally inconsistent and controverted by the State's evidence.

And even if, as the Eighth Court reasoned, the ecstasy evidence was irrelevant—in that it had no capability to suggest that Gonzalez was still under the influence at the time of the offense—it could not have harmed his defense, as it

would provide no basis from which the jury could disbelieve Gonzalez' version of events.

Thus, assuming, *arguendo*, that the complained-of ecstasy evidence was improperly admitted, it was nonetheless harmless, and the Eighth Court's holding to the contrary was erroneous.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW ONE: The Eighth Court erred in holding that evidence that Gonzalez had consumed ecstasy on the day of the murder was irrelevant to his state of mind and self-defense claim because the State failed to introduce evidence of the drug's half-life or the length of its effects, and that, despite any bearing it had on the central issue of self-defense or the relatively innocuous nature of the intoxication evidence, when compared to the severity of the charged offense (capital murder), its probative value was substantially outweighed by the danger of unfair prejudice.[22]

In sustaining Gonzalez' thirteenth and fourteenth issues (wherein he complained of the trial court's admission of evidence of Gonzalez' ecstasy possession, consumption, and intoxication on the day of the murder), despite correctly setting out the long-settled relevance and unfair-prejudice standards, the Eighth Court nonetheless failed to properly apply those standard to the facts of this case, and for the reasons that follow, this Court should reverse the Eighth Court's judgment.

I. The Eighth Court erred in holding that evidence of Gonzalez' ecstasy possession, consumption, and intoxication on the day of the murder was irrelevant.

A. Standard of review

Recognizing that trial courts are in the better position to decide substantive

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[22] Because whether the complained-of ecstasy evidence was relevant merely constitutes a threshold issue that would not be dispositive of Gonzalez' Rule 403 complaint, *see De La Paz v. State*, 279 S.W.3d 336, 342-43 (Tex.Crim.App. 2009), the State herein addresses the relevance and unfair-prejudice issues in a single ground for review.

admissibility questions, a reviewing court must review a trial court's decision under an abuse-of-discretion standard and uphold such decisions unless outside the zone of reasonable disagreement. *See Powell v. State*, 63 S.W.3d 435, 438 (Tex.Crim.App. 2001)(internal quotations omitted).

B. The relevance standard—a "small nudge" is enough

Evidence is relevant if it has *any* tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *See* TEX.R.EVID. 401; *Montgomery v. State*, 810 S.W.2d 372, 386 (Tex.Crim.App. 1990)(op. on reh'g)(emphasis added); And as this Court has established, evidence is not irrelevant simply because it fails to prove or disprove a particular fact; instead, it need only provide a "small nudge" towards proving or disproving a fact of consequence. *See Montgomery*, 810 S.W.2d. at 376.

Nonetheless, after acknowledging that, as this Court explained in *Montgomery v. State*, evidence is relevant if a "reasonable person, with some experience in the real world[,] [would] believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit," *see Gonzalez*, 2017 WL 360690 at *16, the Eighth Court reasoned that, whereas a jury may have the "common sense and understanding" to gauge the

effects of alcohol or marijuana, without evidence of the drug's half-life or the length of its effects, a jury does not have a similar understanding of ecstasy (a "less common drug"), making the fact that Gonzalez had admittedly been "tripping" on ecstasy the morning of the murder irrelevant. *See Gonzalez*, 2017 WL 360690 at *18-20.

The Eighth Court's apparent basis for this reasoning is that, since Gonzalez denied being under the influence of the ecstasy pill taken sometime before 10:32 a.m. and did not document any lingering effects on Facebook after 10:58 a.m., and because the State did not establish the precise meaning of Gonzalez' self-admitted "tripping" and "shaking" as a result of ingesting ecstasy, the State failed to *establish* both the "actual effects of the drug on the mind, either during use, or after the user has come down" and that Gonzalez was, in fact, still under the influence of ecstasy at the time of the encounter with Molina. *See Gonzalez*, 2017 WL 360690 at *18 (emphasis added).

In effect, and without any reference to legal authority for such a requirement, the Eighth Court's reasoning requires the State to present evidence of ecstasy's half-life and the length–and type–of its effects before presenting the jury with evidence of a defendant's intoxication thereby the day of the offense. *See id.*

at *18.[23] In so holding, the Court confused sufficiency with admissibility. *See Manning v. State*, 114 S.W.3d 922, 928 (Tex.Crim.App. 2003)(holding that the court of appeals confused sufficiency with admissibility where it held that evidence insufficient to prove the fact of consequence had little probative value and was thus inadmissible under Rule 403).

Such a holding runs contrary to well-settled precedent from this Court that "evidence merely *tending* to affect the probability of the truth or falsity of a fact in issue is logically relevant [and] need not by itself prove or disprove a particular fact to be relevant; is it sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence." *Montgomery*, 810 S.W.2d at 376; *see also* TEX.R.EVID. 401. And as further explained by this Court, "the threshold burden of relevancy is very low." *See Fischer v. State*, 268 S.W.3d 552, 559 (Tex.Crim.App. 2008).

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[23] The State is aware of no authority requiring such a predicate, nor did the Eighth Court appear to rely on any such authority. Notably, Texas appellate courts have held pre-offense, drug-use evidence relevant to self-defense claims without conditioning that relevance on this initial showing required by the Eighth Court. *See, e.g.*, *Adams v. State*, No. 13-01-340-CR, 2002 WL 31412530, at *2 (Tex.App.–Corpus Christi, Oct. 24, 2002, pet. ref'd)(not designated for publication); *Newman v. State*, No. 11-01-00066-CR, 2001 WL 34375770, at *1-2 (Tex.App.–Eastland, Nov. 15, 2001, no pet.)(not designated for publication); *see also Hosmer v. State*, No. C14-89-01050-CR, 1990 WL 183472, at *3 (Tex.App.–Houston [14th Dist.], Nov. 29, 1990, pet. ref'd)(not designated for publication)(whether the intoxicating effects of the substance would have been present at the time of the offense is a matter of weight of the evidence).

C. The ecstasy evidence was relevant to Gonzalez' self-defense claim—the central dispute in Gonzalez' capital-murder trial.

When an appellant claims self-defense,[24] "the jury is called upon to determine not only the credibility of appellant's testimony that he acted in self-defense, but to analyze and determine all of the surrounding circumstances and conditions in their assessment of the validity of this contention . . . the degree of appellant's intoxication would certainly affect his ability to recall as well as his ability to assess his reaction to the circumstances" germane to the jury's determination of the self-defense issue. *Hosmer*, 1990 WL 183472 at *2; *see also Trujillo v. State*, No. 01-14-00397-CR, 2015 WL 4549242, at *5-6 (Tex.App.–Houston [1st Dist.], Nov. 18, 2015, pet. ref'd)(not designated for publication); *Newman*, 2001 WL 34375770 at *1-2.

Thus, because evidence of Gonzalez' intoxication from drugs would tend to make it less probable that his belief that the degree of force he used was immediately necessary was objectively reasonable, it is relevant to his self-defense claim. *Cf. Manning*, 114 S.W.3d at 924, 928 (evidence of cocaine-metabolite

[24] A person is justified in using deadly force against another: (1) if he would be justified in using force against another under section 9.31 of the Texas Penal Code; and (2) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. TEX. PENAL CODE §§9.31, 9.32.

present in appellant's body after the offense, though the level detected would not produce any effects, was relevant to the issue of whether appellant was intoxicated at the time of the offense even though the State failed to extrapolate the evidence back to the time of the offense); *see also Hosmer*, 1990 WL 183472 at *2 (evidence of the appellant's intoxication is relevant to his self-defense claim).

As such, the Eighth Court's holding that the ecstasy evidence was irrelevant to any issue in the case was erroneous. And, as discussed below, the Eighth Court's additional holding that the ecstasy evidence was unfairly prejudicial under Rule 403 was, likewise, erroneous.

II. The Eighth Court erred in holding that the probative value of the evidence of Gonzalez' ecstasy possession, consumption, and intoxication on the day of the murder was substantially outweighed by the danger of unfair prejudice.

A. Standard of review

In deciding whether to admit or exclude evidence pursuant to Rule 403, a trial court has wide discretion and latitude, and its decision should not be reversed unless outside the zone of reasonable disagreement. *See Montgomery,* 810 S.W.2d at 391-93.

B. The unfair-prejudice standard

Evidence is not unfairly prejudicial simply because it hurts the appellant's

case—such is the central point of offering evidence. *See Rogers v. State*, 991 S.W.2d 263, 266 (Tex.Crim.App. 1999). And while most evidence offered by the State will be prejudicial to a defendant, only evidence that is *unfairly* prejudicial must be excluded. *Hudson v. State*, 112 S.W.3d 794, 804 (Tex.App.–Houston [14th Dist.] 2003, pet ref'd); *see also* TEX.R.EVID. 403. Relevant evidence is presumed to be more probative than unfairly prejudicial. *See Montgomery*, 810 S.W.2d at 389.

Under a Rule 403 analysis, the trial court must balance: (1) the inherent probative force of the proffered item of evidence, along with (2) the proponent's need for that evidence, against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *See Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex.Crim.App. 2006).

C. The probative value of the evidence of Gonzalez' intoxication was not substantially outweighed by the danger of unfair prejudice.

After reciting the proper standard for Rule 403 evidentiary rulings, without

incorporating in its analysis the specific factors set out therein, the Eighth Court reasoned that, because it had concluded that the evidence that Gonzalez had been under the influence of ecstasy the morning of the murder (and was saving the rest of his pills for later use) was irrelevant to his state of mind and self-defense claim, "the evidence did not go to a central issue in the case." *See Gonzalez*, 2017 WL 360690 at *19-20. It further reasoned that, because Gonzalez "was taking a drug while at school," the evidence "[did] raise concerns for swaying a jury on an improper basis, distracting the jury, or permitting the jury to place undue weight on . . . evidence it was ill-equipped to evaluate." *See id*. at *20. But, under a proper analysis, the evidence of Gonzalez' ecstasy possession, consumption, and intoxication the morning of the murder was properly admitted and not unfairly prejudicial.

As previously discussed, the evidence of Gonzalez' intoxication on the day of the murder was relevant to the central dispute in the case—Gonzalez' self-defense claim. This type of intoxication evidence is relevant and highly probative of a defensive issue such as this, as only by knowing Gonzalez' state of mind and ability to accurately perceive the events as they occurred, as well as his ability to accurately recall those events, could the jury accurately and realistically evaluate the validity of Gonzalez' testimony. The evidence was thus relevant to the very

question of whether his belief as to the need to use deadly force was reasonable, and as such, this first factor weighs in favor of admissibility. *See Hosmer*, 1990 WL 183472 at *2; *see also Newman*, 2001 WL 34375770 at *1-2.

As to the second factor, the details of Gonzalez' intoxication during the day had little potential to impress the jury in an irrational and indelible way. The evidence consisted of little more than the fact that he took an ecstasy pill and was "tripping" at school. In light of the charged offense (capital murder) and the other evidence presented (e.g.–Gonzalez' extreme reaction to a verbal confrontation and unrelenting assault on Molina, leaving him bloodied, unconscious, and convulsing), this evidence of taking an ecstasy pill would have little potential to move the jury to convict Gonzalez of murder on an improper basis. Thus, this factor also weighs in favor of admissibility. *Cf. Roberts v. State*, No. 11-09-00175-CR, 2011 WL 2112809, at *5 (Tex.App.–Eastland, May 27, 2011, no pet.)(mem.op.)(not designated for publication)(extraneous-offense evidence regarding less-serious crimes involving property, theft, and alcohol were unlikely to impress the jury in some irrational way in a sexual-assault case); *Smith*, 2006 WL 1710381 at *5 (reasoning that the innocuous details of appellant's crack-cocaine use prior to killing the victim was unlikely to move the jury to convict on an improper basis in light of the offense charged (murder) and other evidence of

guilt admitted).

As to the third factor, the State spent very little time developing the evidence, quickly reviewing the Facebook messages with Gonzalez and then posing four questions as to whether he took a pill that caused him to shake, what type of pill it was, whether he was still under its influence at the time of the altercation, and whether he took any more after that morning. (RR5:199-200). No other witnesses were called to testify about the issue, and the State did not discuss any of the drug-use evidence during its guilt-innocence closing argument. Thus, this factor, too, weighs in favor of admissibility. *See Erazo v. State*, 144 S.W.3d 487, 495 (Tex.Crim.App. 2004)(because little time was spent developing the complained-of evidence, this factor weighed in favor of admissibility).

And as to the fourth factor, this evidence was the only evidence of Gonzalez' intoxication prior to the murder, as Gonzalez had omitted that detail in his recitation of the events leading up to the altercation with Molina. And in light of the amount and nature of the evidence presented against Gonzalez— including testimony from passersby who maintained that Gonzalez was the first aggressor in the vicious attack against Molina, as well as Gonzalez' own statements and conduct after the fact evincing a callous disregard for Molina's serious injuries—his self-defense claim became that much more important, consequently

increasing the State's need for this evidence. *See Hudson*, 112 S.W.3d at 804 (reasoning that because there was ample evidence of appellant's guilt, his defensive theory regarding his mental state became even more material to his case, thus increasing the State's need for the evidence contradicting appellant's defensive theory).

Because all four factors weigh in favor of admissibility, the trial court's decision to admit the complained-of evidence was not outside the zone of reasonable disagreement, and the trial court's 403 ruling should not have been disturbed. *See De La Paz v. State*, 279 S.W.3d 336, 349-50 (Tex.Crim.App. 2009)(where the State's direct evidence did not clearly establish intent and the appellant "stoutly denied criminal intent" and provided a plausible defense that he was in a unique position to see, on balance, factors weighed in favor of admissibility of extraneous offenses despite some potential to affect the jury in some emotional way).

For these reasons, in holding that the evidence of Gonzalez' ecstasy possession, consumption, and intoxication was irrelevant and unfairly prejudicial despite its bearing on the central dispute in the case (Gonzalez's self-defense claim) or its relatively innocuous nature in light of the severity of the charged offense (capital murder), the Eighth Court's judgment was erroneous and should

be reversed.

<u>GROUND FOR REVIEW TWO</u>: The Eighth Court erred in holding that any erroneous admission of Gonzalez' possession and consumption of ecstasy the day of the murder constituted harmful error where the complained-of evidence was developed quickly through a single witness, the State did not allude to the evidence during closing arguments, and Gonzalez' defensive evidence was internally inconsistent and controverted by the State's evidence. In disregarding the weight of these factors, the Eighth Court erred in its application of the appropriate harm standard.

I. Standard of review

The erroneous admission of evidences is ordinarily non-constitutional error, and, as such, an appellate court must disregard the error if the court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect. *See Bagheri v. State*, 119 S.W.3d 755, 763 (Tex.Crim.App. 2003); TEX.R.APP.P. 44.2(b).

II. The appropriate harm standard—"placing in a poor light" is not enough

Disagreeing with the State's assertion that the ecstasy evidence was neither inflammatory nor emotionally charged, the Eighth Court concluded that the evidence that Gonzalez, a teenager, possessed and consumed ecstasy and planned to use it later with his girlfriend should be "disturbing to the average juror" because it would "place [Gonzalez] in a very poor light," thus affecting his substantial rights because it "could" have affected the jury's verdict. *See Gonzalez*, 2017 WL 360690 at *21-22. But if admission of evidence placing an

appellant in a "poor light" constituted reversible error, the erroneous admission of any prejudicial evidence would dispense with the need to conduct a harm analysis at all. This is not, nor has it ever been, the appropriate standard.

Rather, in determining whether non-constitutional error requires reversal, the reviewing court, in light of the entire record, should consider: (1) the character of the alleged error and how it might be considered in connection with the other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence indicating guilt; and (4) whether the State emphasized the complained-of error, *see Bagheri*, 119 S.W.3d at 763, but should not reverse the conviction so long as it is fairly assured that the error, at most, had but a slight effect. *See id.* at 763; TEX.R.APP.P. 44.2(b).

III. Under a proper application of the harm standard, the admission of the complained-of ecstasy evidence did not warrant reversal.

The Eighth Court, having concluded that the ecstasy evidence (comprised of ingesting a single ecstasy pill and saving two more pills for later recreational use with his girlfriend) was "disturbing," further reasoned that, because Lile, Ramos, and Mena did not hear the conversation between Gonzalez and Molina prior to the assault, and because Medrano's credibility was merely "hampered to some degree" by his prior inconsistent statements to police, Gonzalez' case "rose or fell on his

[(Gonzalez')] credibility," such that "suggesting that he was high on drugs would certainly influence his credibility." *See Gonzalez*, 2017 WL 360690 at *21-22.

As a preliminary matter, as discussed in the State's first ground for review, that the ecstasy evidence would "affect the credibility" of Gonzalez' version of events is precisely why it was relevant to Gonzalez' self-defense claim. Conversely, even if, as the Eighth Court held, the ecstasy evidence was not relevant—in that it had no capability to suggest or establish that Gonzalez was still under the influence at the time of the offense such that his ability to accurately perceive and recall the circumstances surrounding his encounter with Molina would not be compromised—then, it could not have harmed Gonzalez' defense. That is, save for the general credibility assessment attendant to all witness testimony, the jury would have no basis (at least, none stemming from this evidence) for questioning the accuracy of Gonzalez' accounting of the facts.

A. In light of the severity of the crime charged, the ecstasy evidence was relatively innocuous.

Turning to the proper application of the harmful-error factors, the State's development of the ecstasy evidence was achieved quickly through a single witness, comprising a mere four pages of the State's 32-page cross examination of Gonzalez (in a record nearly 1,700 pages long) wherein the State posed four short

questions about the type of drug used and whether Gonzalez was still under its influence at the time of the offense. (RR5:196-200). The testimony itself, which essentially consisted of nothing more than Gonzalez' statements that he was in possession of some pills that he planned to later use with his girlfriend and that he was "rollin'" and "tripping" at school, but was not still under the influence at the time of the encounter with Molina,(RR5:196-200); (SX10B), was neither inflammatory nor emotionally charged, misleading, or confusing, and it cannot fairly be said that the evidence that Gonzalez had taken an ecstasy pill earlier in the day but still had some left could have moved an otherwise acquitting jury to convict him of murder. *Cf. Motilla v. State*, 78 S.W.3d 352 (Tex.Crim.App. 2002)(where testimony of appellant's adoptive mother, though irrelevant and somewhat emotional, was not so emotionally charged as to prevent the jury from rationally considering the evidence before it, its admission into evidence was harmless); *Smith v. State*, No. 08-05-00018-CR, 2006 WL 1710381, at *5 (Tex.App.–El Paso, June 22, 2006, pet. ref'd)(not designated for publication)(reasoning that the innocuous details of appellant's crack-cocaine use prior to killing the victim was unlikely to move the jury to convict on an improper basis in light of the offense charged (murder) and other evidence of guilt admitted).

B. The State did not emphasize the complained-of error.

Much like it did in its unfair-prejudice analysis, it appears that the Eighth Court failed to consider the State's lack of emphasis on the ecstasy evidence, instead reasoning (without any support in the record) that despite the absence of a single mention of ecstasy during the State's closing arguments, because the jury asked for the exhibits,[25] which inevitably contained the complained-of Facebook messages, due to the State's references to *other* Facebook messages admitted into evidence, such was the functional equivalent of emphasis by the State. *See Gonzalez*, 2017 WL 360690 at *21.

The Eighth Court's determination that the State emphasized the ecstasy evidence is thus not supported by the record. Rather, once Gonzalez denied being under the influence of ecstasy at the time of the assault, the State abandoned the subject and did not revisit it during the remainder of the guilt-innocence trial. (RR5:196-200). *See Motilla*, 78 S.W.3d at 359 (where the State did not so much as mention the complained-of testimony during closing arguments, it did not emphasize the error).

[25] The record does not reflect that the jury requested the admitted Facebook records at any point during their deliberations.

C. Other evidence indicating guilt

The Eighth Court likewise failed to account for the strength of the State's case, suggesting that Medrano's testimony was merely "hampered to some degree" by his prior inconsistent statements. *See Gonzalez*, 2017 WL 360690 at *22. But, much like Gonzalez' internally conflicting testimony (on the one hand characterizing his attack on Molina as a run-of-the-mill fight between two guys while, on the other hand, attempting to paint Molina as so terribly threatening and frightening that he (Gonzalez) had no choice but to punch, tackle, and pummel him until he stopped responding), Medrano's testimony, riddled with inconsistencies, served to highlight his and Gonzalez' attempt to minimize Gonzalez' culpability, undercutting Gonzalez' self-defense claim and inversely strengthening the State's case. *See, e.g.*, *Guevara v. State*, 152 S.W.3d 45, 50 (Tex.Crim.App. 2004)("Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt"); *Ledesma v. State*, No. 08-04-00043-CR, 2005 WL 3254499, at *7-9 (Tex.App.–El Paso, Dec. 1, 2005, pet. ref'd)(defendant's several inconsistent stories about the victim's disappearance, none of which were corroborated in any way, supported the jury's finding of guilt); *see also Torres v. State*, 794 S.W.2d 596, 598 (Tex.App.–Austin 1990, no

pet.)("[A]ny conduct on the part of a person accused of a crime subsequent to its commission, which indicates a 'consciousness of guilt[,]' may be received as a circumstance tending to prove that he committed the act with which he is charged.")(internal citations and quotations omitted).[26]

Gonzalez' testimony that he punched and tackled Molina because he "got scared" was amply contradicted by the prosecution's evidence: Mena, Ramos, and Lile testified that Gonzalez was the first aggressor—that it looked like Gonzalez was the one yelling and confronting Molina, that Gonzalez stepped towards Molina, who stepped back before Gonzalez punched him, that Gonzalez ran towards Molina (*after* the two had separated) and "bum rushed" him, knocking him off his feet, sending him flying backwards onto the concrete, then quickly crawled on top of him, straddled him, and pummeled him with both fists. (RR3:160-61, 165-66, 168-69, 170-71, 187, 198, 203).

Medrano and Gonzalez themselves testified that Molina kept telling them to leave, and that Molina even asked a bystander to call the police, and yet, Gonzalez

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[26] Gonzalez' testimony that Molina was just trying to "shake himself off" when Gonzalez left him on the sidewalk, (RR5:147), was not only inconsistent with his Facebook messages to Desiree that Molina was "bleeding and twitching," (SX10B), but also contrary to Dr. Contin's medical findings and testimony in support thereof, (RR4B:43, 63-65), and thus supplied the jury with affirmative evidence of his guilt. *See Baldwin v. State*, 264 S.W.3d 237, 242-43 (Tex.App.–Houston [1st Dist.] 2008, pet. ref'd)(defendant's post-incident statements about the cause of the victim's injuries can indicate a consciousness of guilt, especially when grossly inconsistent with medical findings); *Torres v. State*, 794 S.W.2d at 598.

continued arguing with him. (RR3:241); (RR5:129, 137, 139). And neither Mena, Lile, or Ramos, who in conjunction witnessed the whole altercation, ever saw Molina shove, push, or even touch either Gonzalez, Gomez, or Medrano,[27] and the record is completely devoid of any evidence of injury to any one of the three friends.

Medrano and Gonzalez, for all their claims that they were afraid because Molina was being aggressive, continually ignored Molina, calmly continued on their way home without so much as picking up their pace, and never asked anyone for help. (RR5:126-27, 238-39); (RR4A:9, 10). And Medrano, contrary to his later testimony at trial, told police that Molina was not aggressive when he got out of the car and that he could tell that Molina was not angry, but instead was just upset about his car and seemed to simply want to find out what happened to it. (RR4A:82, 84-85). And contrary to his later testimony in support of Gonzalez' claims at trial, Medrano told police (at a time when he admitted his memory was fresher) that Gonzalez waited until Molina turned away before punching him and that Gonzalez punched Molina because he was mad—not because he was

[27] Even if Molina had shoved Gonzalez, it would not justify Gonzalez responding with deadly force. *See Covarrubias v. State*, No. 14-99-00459-CR, 2000 WL 1228655, at *3 (Tex.App.–Houston [14th Dist.], Aug. 31, 2000, pet. ref'd)(not designated for publication)(rejecting appellant's self-defense claim, reasoning that appellant used deadly force where victim had not).

afraid—refuting both Gonzalez' and Medrano's claims at trial that Gonzalez' response in punching Molina was "automatic" and caused by fear. (RR3:247-50); (RR4A:65, 88, 90, 97-98).

Simply, the jury was well justified in concluding that Gonzalez' behavior—repeatedly punching an unconscious and defenseless Molina after he sustained a fracture extending from the back to the front of his skull, flippantly dismissing Mena's cry to return to the unresponsive Molina before casually discussing his plans for Medrano's birthday party, evading police, and later laughing about the fact that he mistakenly believed he had killed a man, (RR3:256, 259); (RR5:151, 159); (RR4B:60); (SX10A– "I hope you didn't get caught. I killed the guy. He went into compulsions [sic] and died"; "Haha jk *Weii* I seen that shit on the news."); (SX10B)—was not the behavior of someone acting in self-defense. *See Sadler v. State*, 364 S.W.2d 234, 237 (Tex.Crim.App. 1963)(citing to *Phillips v. State*, 216 S.W.2d 213 (Tex.Crim.App. 1948))(where appellant and victim got into a fight and appellant struck victim with his fists one to four times and left him lying by the road, such evidence of "disregard for human life" was legally sufficient to sustain the jury's finding of intent to kill); *Hall v. State*, 970 S.W.2d 137, 140 (Tex.App.–Amarillo 1998, pet. ref'd)(evidence of intent to kill was legally sufficient based in part on appellant repeatedly hitting

and kicking the victim while he "sat on the ground in a stupor unable to defend himself," the severity of the victim's injuries, and appellant's "callousness towards his victim as evinced by the decision to leave the injured man on the ground"); *Munoz v. State*, No. 08-07-00325-CR, 2009 WL 2517664, at *4 (Tex.App.–El Paso, Aug. 19, 2009, no pet.)(not designated for publication)(evidence of intent to kill was legally sufficient based, in part, on appellant's failure to summon medical help after injuring victim); *Head v. State*, No. 14-98-00314-CR, 1999 WL 816162, at *3 (Tex.App.–Houston [14th Dist.], Oct. 14, 1999, pet. ref'd)(not designated for publication)(evidence was legally sufficient to sustain murder conviction where appellant ceased his attack only when the victim stopped fighting back and failed to summon police when he believed the victim was dead); *see also Sebring v. State*, No. 14-13-01046-CR, 2015 WL 3917982, at *4 (Tex.App.–Houston [14th Dist.], June 25, 2015, pet. ref'd)(not designated for publication)(much of the same evidence that supported the jury's finding of guilt also supported the finding against appellant on the issue of self-defense).

Rather, Gonzalez' behavior showed that he was completely unshaken by the whole experience, and that, in response to his anger and indignation at the fact that Molina "wouldn't listen" and dared keep arguing with him, his actions were deliberate, calculating, and callous rather than a result of a reasonable fear of

bodily injury.

Thus, the nature and degree of the evidence indicating that Gonzalez did not act in self-defense and was guilty of murder was such that the error (if any) in admitting the complained-of ecstasy evidence was harmless. *See Motilla*, 78 S.W.3d at 355-56 (reviewing court should not reverse unless it lacks a fair assurance that the complained-of error did not influence the jury, or had but a slight effect); *see also Hall*, 970 S.W.2d at 141; *Head*, 1999 WL 816162 at *3 (cases holding evidence legally sufficient for murder conviction based on callousness exhibited towards and continuous assault on defenseless victim).

Thus, by failing to conduct a proper harm analysis, the Eighth Court erred in concluding that the admission of the ecstasy evidence constituted harmful error. *See Motilla*, 78 S.W.3d at 360; *Smith*, 2006 WL 1710381 at *7 (cases holding non-constitutional error in admitting extraneous evidence was harmless where, on balance, the factors weighed in favor of the State).

In sum, where the Eighth Court failed to account for the strength of the State's case, the State's lack of emphasis of the error, and the nature of the complained-of evidence, which was not inflammatory, emotionally charged, misleading, or confusing, the Eighth Court's holding that the erroneous admission of the ecstasy evidence constituted harmful error was erroneous. *See Motilla*, 78

S.W.3d at 358-360 (where (1) the appellate court failed to properly consider the weight of the evidence in its harm analysis by omitting substantial pieces of evidence, (2) the evidence was neither inflammatory, misleading, confusing, or emotionally charged in any significant way, and (3) the State did not mention the evidence during closing arguments, the erroneous admission of the evidence was harmless).

CONCLUSION

The Eighth Court erred in requiring the State to introduce evidence of a drug's half-life and length (and type) of its effects before evidence of pre-offense use of such drug may be properly introduced to rebut the appellant's self-defense claim. And by failing to properly apply well-settled relevance and harm standards by disregarding the minimal time spent by the State in developing the complained-of evidence, the lack of emphasis by the State, the probative value to a central dispute in the case and the State's corresponding need for the evidence, as well as the strength of the State's case (all factors weighing in favor of the State), the Eighth Court erred in its judgment. For these reasons, this Court should reverse the judgment of the Eighth Court, hold that the complained-of ecstasy evidence was relevant, not unfairly prejudicial or harmful, and properly admitted into evidence, and remand the case to the Eighth Court for consideration of Gonzalez'

remaining points of error.

PRAYER

WHEREFORE, the State prays that this Court reverse the Eighth Court's judgment and remand this case to the Eighth Court for consideration of Gonzalez' remaining points of error.

Respectfully submitted,

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/ Raquel López
RAQUEL LOPEZ
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
201 EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 4503
FAX (915) 533-5520
raqlopez@epcounty.com
SBN 24092721

ATTORNEYS FOR THE STATE

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the factual summary on page 1 through and including the prayer for relief on page 54, contains 11,924 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Raquel López
RAQUEL LOPEZ

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on June 2, 2017, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellant's attorney: Ruben P. Morales, rbnpmrls@gmail.com.

(2) The undersigned also does hereby certify that on June 2, 2017, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Raquel López
RAQUEL LOPEZ